UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE PRINCERIDGE GROUP LLC,

Plaintiff,

-against-

OPPIDAN, INC.,

Defendant.

Case No. 11 CV 1460 (AJN)

Civil Action

PLAINTIFF THE PRINCERIDGE GROUP LLC'S RESPONSE TO DEFENDANT'S RULE 56.1 STATEMENT OF UNDISPUTED MATERIAL FACTS AND STATEMENT OF ADDITIONAL MATERIAL FACTS

Plaintiff The PrinceRidge Group LLC ("Plaintiff" or "PrinceRidge"), by and through its attorneys, Cole, Schotz, Meisel, Forman & Leonard, P.A., hereby submits the following response to Defendant Oppidan, Inc.'s ("Defendant" or "Oppidan") Statement of Undisputed Material Facts:[1]

Procedural Background:

1. Not disputed.

2. Not disputed.

3. Not disputed.

Letter of Intent and Engagement:

4. Disputed on the basis that: 1) PrinceRidge did not provide Oppidan with a "Letter of Intent", rather, the parties entered into an Exclusive Engagement Agreement, Declaration of Matthew Kirsch, submitted in support of PrinceRidge's Motion for Summary Judgment ("Kirsch Decl.") ¶¶ 9-10, Exclusive Engagement Agreement, Exhibit E; 2) PrinceRidge forwarded an

[1] All defined terms herein shall have the meaning ascribed to them in PrinceRidge's motion for summary judgment.

initial draft of the Exclusive Engagement Agreement on or about March 19, 2010, Kirsch Decl. Exhibit C; and 3) Oppidan and Oppidan's in-house counsel reviewed and negotiated the Exclusive Engagement Agreement prior to its execution. Kirsch Decl. Exhibit D.

5. Disputed on the basis that: 1) PrinceRidge did not provide Oppidan with a "Letter of Intent", rather, the parties entered into an Exclusive Engagement Agreement, Kirsch Decl. Exhibit E.

6. Not disputed.

7. Disputed as to the words "to be sold." PrinceRidge was not engaged to "sell" any properties. Kirsch Decl. Exhibit E.

8. Not disputed.

9. Disputed on the basis that the Contract does not state that "Compensation was based upon a commission," rather, in Section 3 of the Contract, entitled "Compensation," the Contract says PrinceRidge was to be paid "a fee . . . in consideration for the Advisory Services provided by PrinceRidge." Exclusive Engagement Agreement, Kirsch Decl. Exh. E. Moreover, Section 3 of the Exclusive Engagement Agreement provides a broader description of the total compensation that PrinceRidge could earn. See Kirsch Decl. Exh E.

10. Disputed on the basis that the Contract does not use the word "commission" to describe the Success Fee Oppidan agreed to pay PrinceRidge for its advisory services, and it does not use the word "commission" in Paragraph 3(a). Rather, the Contract defines the "compensation" Oppidan agreed to pay PrinceRidge as the "Success Fee." Exclusive Engagement Agreement, Kirsch Decl. Exh. E, ¶ 3(a). In addition to the "Success Fee" identified in paragraph 3(a) of the Exclusive Engagement Agreement, PrinceRidge was also entitled to compensation as set forth in the preceding paragraph.

11. Not disputed.

12. Disputed insofar as the Exclusive Engagement Agreement also provides for additional forms of compensation as set forth in PrinceRidge's response to paragraph 9, *supra*.

13. Not disputed.

14. Not disputed.

PrinceRidge's Action Plan to Sell the Real Estate[2]:

15. Disputed on the basis that PrinceRidge provided multiple services to Oppidan, including: (i) determining the scope of services required by Oppidan by familiarizing itself with the properties, business, operations, financial condition, management, and prospects of the portfolio; (ii) contacting and introducing prospective investors to the opportunity presented by the Properties; and (iii) providing advisory and investment banking services to Oppidan. Exclusive Engagement Agreement, Kirsch Decl. Exh. E, ¶ 1.

16. Disputed on the basis that PrinceRidge was not engaged to "sell" anything; rather, PrinceRidge's financial advisory services were sought by Oppidan identify firms and/or individuals who had available capital to infuse into Oppidan's 16-property portfolio of distressed real estate. Kirsch Decl. ¶ 11, Deposition of Matthew Kirsch Volume I, July 20, 2012 ("Kirsch Dep. I"), Exhibit B to Kirsch Decl., 72:2-23; 91-92. To that end, PrinceRidge sought to: 1) identify entities interested in providing equity to a joint venture that might acquire the Properties; 2) identify entities interested in providing loans to refinance the existing mortgages; or 3) identify entities interested in purchasing one or all of the Properties outright. Id. at ¶ 11; Kirsch Dep. I 72:2-23; 91-92. Moreover, PrinceRidge prepared the "discussion materials" consistent

[2] The headings set forth in PrinceRidge's responses are transposed verbatim from Oppidan's 56.1 statement for ease of reference for the Court. PrinceRidge does not make any admissions regarding their substance.

with the Exclusive Engagement Agreement to provide the requisite information outlining the potential opportunity to clients. Kirsch Dep. I 71:2-13; Exhibit F.

17. Disputed on the basis that PrinceRidge's discussion materials were prepared to gauge the interest of prospective investors for Oppidan, not to "sell" the Properties. Kirsch Decl. ¶ 12, Kirsch Dep. I, 71:2-13.

18. Not disputed.

19. Disputed on the basis that PrinceRidge did not represent Oppidan in the "sale" of the 16 properties. Kirsch Decl. ¶ 16; Kirsch Dep I., 163:9-16.

20. Disputed on the basis that PrinceRidge instructed its clients and potential investors to contact Oppidan *directly* if it had any additional questions or issues regarding the Properties following receipt of the discussion materials. Moreover, to the extent PrinceRidge received any bids, it forwarded those bids directly to Oppidan without any commentary and/or guidance from PrinceRidge. Kirsch Decl. ¶¶ 14-15; Kirsch Dep. I 103:2-12, 332:5-23.

21. Disputed on the basis that PrinceRidge did not prepare "marketing materials" for Oppidan; PrinceRidge prepared "discussion materials" regarding the Properties in accordance with the Exclusive Engagement Agreement in order to provide the requisite information outlining the potential opportunity to clients and investors. Kirsch Decl. ¶ 12, Discussion Materials, Exhibit F.

22. Disputed on the basis that PrinceRidge did not have a "process of finding buyers," rather, PrinceRidge sought to find investors and introduce them to the transaction. Kirsch Decl. ¶¶ 10-11.

23. Disputed on the basis that PrinceRidge did not merely seek to identify buyers, rather, PrinceRidge sought to find investors and introduce them to the transaction. Moreover,

Tom Connors did not state at deposition that PrinceRidge obtained bids for the Properties, rather, Connors indicated that the process was to find people interested in bidding on the Properties and/or working with Oppidan directly to negotiate the purchase of the Properties. Deposition of Tom Connors, July 19, 2012, 43:19-21. Moreover, before even entering into the Exclusive Engagement Agreement, PrinceRidge's work resulted in very specific financial advice regarding the financial issues Oppidan faced at that time: 1) refinancing the existing debt on the Properties; 2) renegotiating the loans on the Properties with existing lenders; or 3) the disposition of the Properties through sales by Oppidan. (See Kirsch I 16 – 17:18 - 5, 42:15-20; Ryan Dep. 34 – 35.)

24. Not disputed.

25. Disputed on the basis that the allegations presume that PrinceRidge was involved in the "sale" of any of the Properties. PrinceRidge was not involved in any negotiations regarding the "sale" of any Properties, PrinceRidge merely sought to find investors and bring them to the transaction. Kirsch Decl. ¶¶ 10-11, 36; Kirsch Dep. I, 102:23-103:12, 163:9-15, 195:6-196:20.

26. Disputed on the basis that the allegation does not encapsulate all of the financial advisory services that PrinceRidge provided to Oppidan. As stated, PrinceRidge sought to find investors and bring them to the transaction. Kirsch Decl. ¶¶ 10-11, 36; Exclusive Engagement Agreement, Kirsch Decl. Exh. E, ¶ 1(a)-(b); Kirsch Dep. I, 102:23-103:12, 163:9-15, 195:6-196:20. In addition, provided financial advise to Oppidan regarding the portfolio of properties, specifically, advise regarding: 1) refinancing the existing debt on the Properties; 2) renegotiating the loans on the Properties with existing lenders; or 3) the disposition of the Properties through sales by Oppidan. (See Kirsch I 16 – 17:18 - 5, 42:15-20; Ryan Dep. 34 – 35.) Only after

PrinceRidge provided these financial advisory services did the parties enter into the Exclusive Engagement Agreement. See Kirsch I 16 – 17:18 - 5, 42:15-20; Ryan Dep. 34 – 35.

27. Disputed insofar as Oppidan refers to the people and entities to whom PrinceRidge sent its discussion materials as "purchasers" – these people and entities were potential "investors." Kirsch Decl. ¶ 12; Kirsch Dep. I, 71:2-13.

PrinceRidge is not a Licensed Real Estate Broker:

28. Not disputed.

29. Not disputed.

30. Not disputed.

31. Not disputed.

PrinceRidge Took All Actions of a Real Estate Broker to Sell the Properties:

32. Disputed on the basis that PrinceRidge did not "list" the Properties for sale; rather, it presented an investment opportunity to potential investors through the discussion materials. Kirsch Decl. ¶¶ 9-12; Kirsch Dep. I, 161:21-22.

33. Disputed on the basis that PrinceRidge was not the broker for the sale of the Properties and, immaterial as to a third-party news entity's description of the transaction. Kirsch Decl. ¶¶ 10-15; Kirsch Dep. I, 163:6-15. As Kirsch testified, he did not approve of the language referenced in the "Dolan Media Newswire Story", and was not contacted by "Dolan" before the internet posting. Kirsch Dep. 152:17-20; 153:12-14;160:3-5; 9-11; 20-23, 161:21-22.

34. Immaterial as to a third-party news entity's description of the transaction. As Kirsch testified, he did not approve of the language referenced in the "Dolan Media Newswire Story", and was not contacted by "Dolan" before the internet posting. Kirsch Dep. 152:17-20; 153:12-14;160:3-5; 9-11; 20-23, 161:21-22.

35. Disputed on the basis that Matthew Kirsch specifically stated at deposition that he "did not list anything with anyone" related to the Properties. Kirsch Dep. I, 161:21-22; 172:13-174:4. Moreover, Kirsch testified that he does not know how any purported "listing" ended up on the internet, and that when he received the "Listings Review Request", he promptly deleted it. Kirsch Dep. I 160:3-11.

36. Disputed to the extent that Oppidan uses the word "listing" to describe PrinceRidge's actions with respect to the Properties; PrinceRidge never listed the Properties for sale. Kirsch Decl. ¶¶ 11-13; Kirsch Dep. I, 161:21-22.

37. Disputed on the basis that PrinceRidge merely prepared discussion materials regarding the Properties and presented such materials to potential investors to bring an investment opportunity to their attention. Kirsch Decl. ¶¶ 12-13.

38. Disputed on the basis that "setting up a purchase of the properties" is too vague and ambiguous to warrant a response. To the extent that Oppidan's allegation states that PrinceRidge's goal was to "sell" the properties, then this allegation is disputed. PrinceRidge did not have the authority or ability to sell the properties. Kirsch Decl. ¶¶ 10-15, 36, Exclusive Engagement Agreement, Exh. E, ¶¶ 1 and 3. PrinceRidge provided financial advisory services to Oppidan only. Kirsch Decl. ¶10.

39. Disputed on the basis that Tom Connors stated at deposition that he worked with Matthew Kirsch to find buyers and sellers, generally, not specifically with respect to the Properties. Connors Dep. I, 29:8-32:17.

40. Disputed insofar as Oppidan asserts that PrinceRidge had a "role in selling the properties." PrinceRidge did not have a "role in selling the properties," as evidenced by PrinceRidge's complete lack of involvement in any negotiations regarding the Properties. Kirsch

Decl. ¶ 36. Rather, PrinceRidge sought to find investors and bring them to the transaction. Id. at ¶¶ 11-15, Exclusive Engagement Agreement, Exh. E, ¶ 1(a) and (b); Kirsch Dep. I, 102:23-103:12, 163:9-15, 195:6-196:20.

41. Disputed insofar as the allegation seeks to limit the work performed by PrinceRidge for Oppidan. PrinceRidge provided financial advisory services to Oppidan, including a review of Oppidan's best course of action regarding its distressed assets. Kirsch Decl. ¶10-11; Kirsch Dep. I 72:2-23; 91-92.

42. Disputed on the basis that PrinceRidge did not discuss any "selling points" or engage in any negotiations of any kind with potential purchasers or investors regarding the Properties. PrinceRidge directed its clients and potential investors to contact Oppidan directly regarding any additional questions or issues regarding the Properties. Kirsch Decl. ¶¶ 14 and 36, Exclusive Engagement Agreement, Kirsch Decl. Exh. E, ¶ 1(a) and (b); Kirsch Dep. I, 102:23-103:12, 163:9-15, 195:6-196:20.

Statement of Additional Material Facts[3]:

1. At all relevant times, PrinceRidge was a FINRA registered broker/dealer engaged in the financial advisory services industry. Kirsch Decl. ¶ 2, FINRA Membership Agreement attached to the Supplemental Declaration of Matthew Kirsch as Exhibit A.

2. In connection with the Advisory Services PrinceRidge provided to Oppidan in accordance with the Exclusive Engagement Agreement, PrinceRidge contacted National Retail Properties ("NRP"). See Exh. "G" to Kirsch Decl.; Deposition of Matt Kirsch Volume II ("Kirsch Dep. II") attached to the Kirsch Decl. as Exhibit "H"; 351-352.

[3] This Statement of Additional Material Facts is submitted in opposition to Oppidan's motion for summary judgment regarding PrinceRidge's claim for breach of the implied covenant of good faith and fair dealing.

3. Kirsch was introduced to NRP in or about May, 2010, through a colleague at PrinceRidge. Kirsch Decl. at ¶ 17; Kirsch Dep. II 351:5-22.

4. Kirsch sent NRP the discussion materials, and had multiple discussions with NRP's acquisitions department, specifically, Joshua Lewis, from May to June, 2010, regarding the Properties to determine if NRP had any interest in speaking with Oppidan regarding a potential transaction. Kirsch Decl. at ¶ 17; Kirsch Dep. II 354:6-10.

5. Lewis informed Kirsch that NRP was interested in some of the Properties, and that NRP intended to submit a bid. Kirsch Decl. at ¶ 18. Lewis directed Kirsch to contact NRP's senior executive vice president, Jay Bastian, to continue the process. Id.

6. On June 24, 2010, Kirsch emailed Bastian and advised him that first round bids were due on June 25, 2010. Id. at ¶ 19; (A true and accurate copy of Kirsch's June 24, 2010 email is attached to the Kirsch Decl. as Exhibit "I").

7. On June 25, 2010, Bastian emailed Kirsch. In that email, Bastian never indicated that NRP was not interested in the Properties. Bastian also never indicated that NRP was not going to bid on the Properties. Rather, Bastian abruptly informed Kirsch that NRP would not "be participating in [PrinceRidge's] process". Id.

8. Thereafter, Ryan informed Kirsch that Bastian was mistaken, and that Kirsch should continue to discuss the NRP's interest in a transaction with Oppidan. Ryan stated that he had directed NRP to continue to speak with PrinceRidge, and participate in PrinceRidge's process. Kirsch Decl. at ¶ 20; Kirsch Dep. II 356-357.

9. As of June 25, 2010, however, NRP did not submit a bid for any of the Properties. See Kirsch Decl. at ¶ 21. Rather, Kirsch learned that NRP's head of acquisitions was conveniently in Minnesota at or about that time meeting with Gander Mountain and Camping

World. See Email between Joe Ryan and Jay Bastian dated June 30, 2010 confirming that NRP was meeting with Gander Mountain attached to the Kirsch Decl. as Exhibit "J".

NRP Purchases Ten (10) Properties from Oppidan for Over $100 Million:

10. On July 26, 2010, NRP sent a Letter of Intent ("LOI") to Oppidan indicating its intent to purchase five (5) Properties for $50,470,996.00. Kirsch Decl. ¶ 23; (A true and accurate copy of the July 26, 2010 LOI is attached to the Kirsch Decl. as Exhibit "L"); Ryan Dep. 86:6-17.

11. On or about August 17, 2010, NRP and Oppidan entered into a Real Estate Purchase and Sale Contract ("Contract 1"). Kirsch Decl. ¶ 24; (A true and accurate copy of Contract 1 is attached to the Kirsch Decl. as Exhibit "M").

12. Contract 1 represents the consummation of the sale of the Properties contemplated by the July 26, 2010 LOI. Ryan Dep. 87:1-8. The Properties identified in Contract 1 are contained in the Portfolio included in the Exclusive Engagement Agreement. Ryan Dep. 83-84.

13. Pursuant to the Sixth Amendment to Contract 1, the final purchase price of the Properties was $50,370,996. Kirsch Decl. ¶ 25; (A true and accurate copy of the Sixth Amendment to Contract 1 is attached to the Kirsch Decl. as Exhibit "N").

14. On June 6, 2011, NRP sent another LOI to Oppidan indicating its intent to purchase five (5) **additional** Properties for $50,395,638. Kirsch Decl. ¶ 26; (A true and accurate copy of the June 6, 2011 LOI is attached to the Kirsch Decl. as Exhibit "O"); Ryan Dep. 91-92.

15. On or about June 15, 2011, NRP and Oppidan entered into another Real Estate Purchase and Sale Contract ("Contract 2"). Kirsch Decl. ¶ 26; (A true and accurate copy of Contract 2 is attached to the Kirsch Decl. as Exhibit "P").

16. Contract 2 represents the consummation of the sale of the Properties contemplated by the June 6, 2011 LOI. Ryan Dep. 93:18-22.

17. The Properties identified in Contract 2 are set forth in the Portfolio, and included in the Exclusive Engagement Agreement. Ryan Dep. 91-92. The final purchase price of the Properties contained in Contract 2 was $50,395,638. Kirsch Decl. ¶ 27; Exh. "P".

18. Oppidan failed to pay PrinceRidge its Success Fee in accordance with the Exclusive Engagement Agreement for the services it rendered to Oppidan. (Kirsch Decl. ¶ 37.)

DATED: New York, New York
April 8, 2013

Respectfully submitted,

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